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No. 85-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IN RE
GRAND JURY MATTER
ANTONI GRONOWICZ,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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Point I

This case is not moot because God's Broker remains suppressed by a judicially approved, unconstitutional government investigation which continues to chill authors and publishers from wide open, robust and uninhibited speech.

The government's unconstitutional investigation of the truth or falsity of God's Broker has undermined the book's credibility, removed it from bookstores, and severely diminished its economic value. Instead of permitting the contents of God's Broker to be fairly tested in the marketplace of ideas, the government intervened with an unprecedented criminal investigation into the book's truth. The Court of Appeals erroneously condoned this intimidating, inhibiting and stigmatizing governmental interference with free speech. The book remains withdrawn and publishers are now fearful of republishing it because of this unconstitutional investigation

erroneously supported by the courts.

Petitioner's counsel requests that Mr. Gronowicz' widow and primary heir, Sophie Gronowicz, be substituted as legal representative for the deceased so that the right to publish God's Broker without governmental interference may be vindicated. All the materials subpoenaed by the grand jury possessed by her husband are now possessed by Sophie Gronowicz, and she now stands in his position with the same commitments. It is her highest purpose and resolve to have the book republished and widely circulated. Whatever the government may claim, Mr. Gronowicz' death does not remove the need to resolve the fundamental controversy of this case -- whether God's Broker may be marketed and distributed free from the threat and burden of a judicially approved government investigation into its truth. The contemplated discontinuance of the

investigation does not remove the damage of past investigation and judicial approval or the threat and chill of possible future investigation. Judicial approval of the investigation irreparably damages the economic value of the book and its potential for publication more effectively than would an indictment. The imprimatur of the federal judiciary is stamped on this condemnation of God's Broker. This Court should reverse the judicial approval by granting certiorari and holding any investigation of the book, past or future, unconstitutional.

The government has not damaged God's Broker or First Amendment values any the less because of Mr. Gronowicz' death. The book did not die when its author died. Sophie Gronowicz intends to have God's Broker republished. The government's conduct in investigating the book continues

to have a chilling effect on her and prospective publishers. The book was damaged by adverse publicity arising from the judicially approved criminal investigation. That judicial approval remains the law and is the salient fact in public opinion about God's Broker.

As long as there is no ruling that the investigation of the book was constitutionally improper, the book remains unconstitutionally burdened by the executive and the judiciary in future efforts to obtain publishers, readers and an opportunity for ultimate vindication in the marketplace.

Mrs. Gronowicz' husband was firmly resolved, in spite of extremely precarious health, to resist this unprecedented assault on the First Amendment, to obtain the widest possible audience for his book, and to thwart the government's attempt to discredit it. Total destruction of God's Broker by government action is well

advanced and the unconstitutional burden on distribution of the book has not been remedied by the courts. Potential publishers and Sophie Gronowicz must remain concerned that they will subject themselves to a criminal investigation by republishing the book. They must be skeptical that the public will buy a book which has been criminally investigated with judicial approval. The assertion by the United States Attorney that "no further investigation of this matter is contemplated" is not a promise or a commitment and may only be contingent upon self-censorship and self-silencing by whoever owns the book.

Under present circumstances, Sophie Gronowicz, the primary owner of the copyright of God's Broker, is posed with a real dilemma created by the government's unconstitutional conduct: whether to withhold the book from its rightful place

in the marketplace of ideas, contrary to the clear wishes of her husband, or to republish the book, thereby risking a renewal of the unconstitutional investigation with all the resulting burdens, jeopardies, and expenses to family members and the publisher. Both choices are weighted by knowledge that the book has been damned by the government with judicial approval.

The grounds for a ruling that this case is not moot are stronger than those held to establish non-mootness in Nebraska Press Association v. Stuart, 427 U.S. 539, 546-547 (1976). Only likely future repetitions of the dispute were present in Nebraska Press. There, as noted in Murphy v. Hunt, 455 U.S. 478, 483 (1982), the controversy between the parties was capable of repetition in large part because the dispute between the Nebraska Press Association and the State of Nebraska

was likely to recur. Here there is a dispute that is similarly likely to recur, because the enduring interest of the Authors League of America, Inc., and the American Civil Liberties Union, amici curiae, in the relevant issues is similar to that of the Nebraska Press Association. In the instant case, however, the dispute between the government and those who would sponsor, publish, or sell God's Broker not only is likely to recur, but the inhibiting and chilling effect of the government's conduct on potential sponsors, publishers and sellers is a present reality now.

Point II

If this Court concludes that the case is moot, it should grant the petition for certiorari, vacate the decision below and remand the case for dismissal.

In United States v. Munsingwear, 340 U.S. 36, 39 (1940), this Court stated:

> The established practice of this Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.

Vacation and remand is not discretionary; it is "the duty of the appellate court." Id. at 40, quoting Duke Power Co. v. Greenwood County, 299 U.S. 259, 267 (1936). Vacation and remand removes the res judicata and stare decisis effect of the judgment and decisions below.

The Court continues to follow this established practice in civil cases that become moot pending review. See, e.g.

Iron Arrow Honor Society v. Heckler, 464 U.S. 67, 73 (1983); Tulare Lake Canal Co. v. United States, 459 U.S. 1095 (1983); Securities and Exchange Commission v. Board of Trade of Chicago, 459 U.S. 1026 (1982). The rule applies whether mootness results from a party's death, see Fletcher v. Bryan, 361 U.S. 126 (1959), or from some other circumstance. See, e.g., Iron Arrow, supra.

The sole exception to this practice occurs when a party dies pending this Court's direct or collateral review of his federal or state criminal conviction. In that situation the Court will dismiss the petition or appeal which has the effect of letting the lower court decision stand. Dove v. United States, 423 U.S. 325 (1976); Mintzes v. Buchanon, ____ U.S. ____, 105 S. Ct. 2006 (1985).

This is a civil case, which if it is moot, is controlled by Munsingwear. The

decision of which review is sought affirms an order holding Gronowicz in civil contempt for failing to comply with a subpoena duces tecum. Gronowicz was not convicted of, or even indicted for, a crime. Hence, the exception for review of criminal convictions is inapplicable.

Because the government has stated it does not contemplate pursuing its investigation of Gronowicz's book, it can point to no collateral consequences that justify letting the Court of Appeals' opinion stand.

The government is taking the position in this case that the judgment below should be vacated only if the Court would have granted certiorari, and that the petition should be denied because the case is not worthy of review, citing Dove and Mintzes without mention of Munsingwear. See U.S. Mem. in Opp. at p. 3, n.3.

This argument is without merit for two reasons. First, this case is controlled by Munsingwear and application of Munsingwear has never turned on the merits of a petition for certiorari. This Court has never accepted this argument of the government. See Commodity Futures Trading Commission v. Board of Trade of Chicago, 701 F. 2d 653, 657 (7th Cir. 1983).

Second, even if the government is correct in proposing "certworthiness" as a prerequisite to vacation and remand, this case satisfies that requirement.

As both the petition itself and the supporting briefs of amici curiae make clear, this case presents a significant constitutional issue. It requires the Court to determine whether, and under what circumstances, the First Amendment permits a criminal inquiry into the truth or

falsity of a book. It raises the questions whether a difference of constitutional magnitude exists between civil and criminal punishment for false speech, and whether purportedly intentional false speech ever merits constitutional protection. A decision in this case would affect all authors and journalists who write about matters of public interest. The case thus satisfies one of the established criteria for certiorari. See Sup. Ct. R. 17.1(c).

Furthermore, the government's argument that no conflict on this issue exists among the circuits, see Sup. Ct. R. 17.1(a), is irrelevant in this situation. Gronowicz's case is unprecedented; the federal government has never before asked a court to permit a criminal inquiry into the validity of an author's work.

A strong indication of the decision's certworthiness is the number of opinions it generated: a majority, two

concurrences and three separate dissents among the eleven judges who heard the case in banc. This "internal" conflict in a case of first impression demonstrates that a substantial basis for certiorari exists if the case is not moot.

Gronowicz's case presents a meritorious petition for certiorari. Thus, even if the government correctly asserts that "certworthiness" is a prerequisite for application of Munsingwear, this case satisfies that requirement. Accordingly, this Court should grant the petition for certiorari, vacate the decision below and remand the case with directions to dismiss it.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted. The judgment below should be reviewed on the merits, or if the case is moot, should be vacated and the case remanded to the District Court for dismissal.

Respectfully submitted,

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